



DEPARTMENT OF THE AIR FORCE
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON DC

OFFICE OF THE ASSISTANT SECRETARY

07 OCT 2003

MEMORANDUM FOR DUSD (I&E)

FROM: SAF/IE

Subject: Request for DoD Support for Air Force's Performance Based-Restoration Approach

As you are aware, the Air Force has consistently sought to streamline and accelerate its restoration program to increase cleanup efficiency (time and cost) and effectiveness, and has vigorously opposed regulatory process that impedes such progress and reform. The Secretary of the Air Force and I fully endorse a bifurcated DoD approach that will allow both the Air Force and Navy approaches to proceed on an interim basis under the circumstances set forth below.

The Air Force performance-based approach directs that remedy selection and implementation should be based on actual results and performance, open notification and dialogue among parties and stakeholders, information exchange and reasonable site access for performance verification, and Air Force accountability for performance. (See Attachment 1, *Air Force Principles*) The *President's Management Agenda* fully supports and in fact directs this approach, which requires government reform based upon principles that government programs and activities should be results-oriented and market-based to actively promote innovation, so that "emphasis on process will be replaced by a focus on results."

As requested, I have included a legal opinion from the Air Force General Counsel that addresses three different legal issues pivotal to the Air Force approach (Attachment 2). I am informed that ODGC EI endorses the legal conclusions and positions set forth in this opinion. I fully support this opinion as well.

The conceptual outline of the Air Force's proposed way forward and support required from DoD is:

a. Each Service may proceed forward to execute records of decision (RODs) containing Land Use Controls (LUCs) without DoD Service 72-hour review, provided the LUC commitments fall within the general category of provisions as agreed upon by all the Services and DoD.

b. DoD fully supports both Service approaches to RODs, Federal Facility Agreements and Interagency Agreements that satisfy statutory and regulatory requirements. Such support includes:

(1) Written DoD communication with HQ EPA that EPA must negotiate in good faith with all Services on ROD execution.

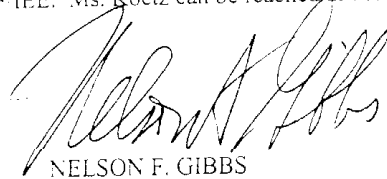
(2) DoD's support for specific Air Force RODs to go forward (unilaterally if necessary).

(3) DoD's expectation of EPA adherence to its stated position that the Regions are not under any HQ EPA opposition to and constraints related to the Air Force's approach, and there is agreement that "...cleanup needs to go forward where we have consensus on the physical remedy to be performed even where we have differences on other aspects of post-ROD implementation relating to EPA's authority" (See July 29, 2002 letter from Marianne Horinko to J.P. Woodley).

(4) DoD will support immediate Air Force elevation of disputes through interagency dispute procedures.

(d.) DoD and Service commitment to engage in productive internal dialogue and discussion with regulators to increase program efficiencies and effectiveness and avoid the inappropriate application of guidance. This includes a commitment to develop joint program metrics and apply the principles of EPA initiatives such as Triad, One Cleanup Program, Land Revitalization, etc., and set goals for performance, particularly in terms of time and cost.

I look forward to the timely resolution and progress in cleanup decisions. My point of contact for this matter is Ms. Maureen Koetz, SAF/IEE. Ms. Koetz can be reached at 703-797-9297.



NELSON F. GIBBS

Assistant Secretary of the Air Force
(Installation, Environment & Logistics)

Attachments

1. Air Force Principles
2. SAF/GC Opinion

cc.

SECAF
SAF/GC
SAF/PA
AF/IL
SAF/IEE
SAF/IEI

ODGC/EI
ASN(I&E)
ASA(I&E)

AIR FORCE PRINCIPLES FOR PERFORMANCE-BASED RECORDS OF DECISION IN ENVIRONMENTAL RESTORATION

1. *The President's Management Agenda* clearly directs federal agencies to reform their activities to prioritize performance and results so that "emphasis on process will be replaced by a focus on results." Thus the focus of the Air Force's (AF) environmental restoration program is to select, implement, maintain, and where necessary review and monitor remedial action results that protect human health and the environment. EPA has joint responsibility with the AF to select the remedy at National Priority List (NPL) facilities, and an interest in confirming that such remedies remain in place and continue to be protective. The actions of both agencies should reflect the President's direction to restore freedom to manage to responsible agencies, eliminating excessive command and control, approval mechanisms and red tape that hinder efficiency.
2. Records of Decision (RODs) are public documents that should direct: (i) remedy implementation based on performance needed to achieve remedial objectives, (ii) notification and dialogue among parties, (iii) reasonable access to sites for performance verification, and (iv) accountability for performance on the part of the AF.
3. The AF has the responsibility and obligation to carry out the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and National Contingency Plan (NCP) requirements as it implements, maintains, and where necessary reviews and monitors protective remedies needed to achieve remedial objectives.
4. Restoration resources in the form of time, money and personnel should be focused on defining remedial objectives (i.e., results) and the essential actions required to achieve those objectives. Such objectives and essential actions are enforceable requirements of the ROD under CERCLA and the NCP.
 - a. The ROD should be streamlined to contain remedial objectives, essential implementation and maintenance actions to achieve the objectives, and other content elements required by CERCLA and the NCP. These performance objectives in the ROD, supported by the "essential actions" taken to meet them, are enforceable requirements of the remedy.
 - b. The Air Force must still determine the detailed steps to take to carry out actions that achieve remedial objectives. This can include, as appropriate, O&M plans or detailed implementation plans; the details of such documents will be shared with regulators for review and comment, but are not subject to additional EPA approval and enforcement beyond that applied to the ROD, subject to Section 8 below.
 - c. The ROD should not require new or further deliverables and documents, or contain repetitive information, and should use cross-references, existing data, templates, and remedy selection assumptions wherever it makes sense and is cost-effective to do so.

5. The Air Force will be held accountable to achieve the remedial objectives and essential actions identified in the ROD. This means being prepared for enforcement action should the Air Force fail to perform its essential responsibilities.

- a. The Air Force remains subject to CERCLA enforcement mechanisms by EPA, states, and citizens if it fails to implement and maintain a protective remedy, such as, but not limited to, citizen suits, civil penalties, etc.
- b. The Air Force remains subject to stipulated penalty provisions where existing Federal Facilities Agreements (FFAs) identify RODs as "primary documents."

6. The Air Force will agree to provide essential information to EPA, states and the public regarding the status of achieving performance objectives and essential actions identified in the ROD. EPA and states can independently verify such information through reasonable access to documents and facilities. Depending on site-specific risk factors that may warrant a change in reporting frequency, the expectation is that an annual summary report will be appropriate, supplemented by additional prompt reporting of any remedy deficiency or failure that presents or could imminently lead to an actual risk to human health and the environment, and the actions taken or planned to address and correct such deficiency or failure. Such limited monitoring and reporting, as described here, is an exception to the prohibition on post-ROD implementation measures reflected in the 23 Jan 2002 Air Force Policy and Guidance on Remedy Selection Documentation in Records of Decision (RODs).

7. Because "success" and "compliance" will be defined in terms of achieving performance objectives and essential actions, rather than meeting document exchange deadlines, Air Force personnel must foster and maintain dialogues with the regulators, particularly concerning technical implementation issues. Work plans or other technical documents that are not independently enforceable or subject to regulator approval should nonetheless undergo review by all parties to ensure compatibility with ultimate remedial objectives. The failure to do so will increase the likelihood of a legitimate challenge by the regulators and the public as to whether remedial objectives in fact are being achieved (or have been achieved, if a closeout determination is at issue).

8. Integration of Performance-Based Response Actions with existing FFAs and RODs:

- a. The process improvements developed as part of the Air Force performance-based principles do not change obligations under existing FFAs or RODs. However, parties to existing FFAs may amend them or interpret them to incorporate these performance-based actions and improvements.
- b. If an existing FFA already addresses implementation, O&M plans, or completion and review provisions (e.g., identifies an O&M plan as a "primary" document"), then such documents should conform to the enforceable objectives and actions contained in the ROD.

- c. The Air Force should update the ROD as necessary to protect human health and the environment in conformance with Section 300.435 of the National Contingency Plan (i.e. perform a ROD amendment for fundamental changes, or an Explanation of Significant Difference (ESD) for significant changes, or record non-significant or minor changes in the post-ROD site file). If the Air Force finds that such an update is necessary, it should be done in accordance with the approach defined by these principles. In particular, if hazardous substances are left in place above unlimited use and unrestricted exposure levels, the 5-year review affords the Air Force an opportunity to confirm the conclusions in an existing ROD or to update the ROD if differences significantly or fundamentally alter the basic features of the selected remedy with respect to scope, performance or cost.
- d. The Air Force shall incorporate these principles both in negotiating future Interagency Agreements and in modifying existing FFAs.



DEPARTMENT OF THE AIR FORCE
WASHINGTON, DC

Office Of The General Counsel

OCT 9 7 2003

MEMORANDUM FOR SAF IE

FROM: SAF GC

SUBJECT: Summary Re Authority of the Department of the Air Force in CERCLA
Cleanup Actions

You have asked for my opinion concerning the authority of the Air Force relative to EPA with respect to Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) cleanup programs and Air Force activities conducted pursuant to the Defense Environmental Restoration Program, specifically in the context of remedies under CERCLA, Federal Facility Agreements and Records of Decision. My legal analysis and conclusions are set forth in a more extensive legal Memorandum provided to you separately. This document is a summary of the Memorandum.

During the last two years, disagreements between the EPA and the Air Force have almost completely stalled the issuance of Records of Decision by the Air Force, particularly those involving land use controls. The dispute centers on how EPA interprets Section 120 of CERCLA which requires federal agencies to comply with "...guidelines, rules, regulations and criteria..." in the same manner and to the extent...as such...are applicable to other facilities." EPA believes its informal guidance and policy documents are covered by these terms. The nature and enforceability of "guidelines, rules, regulations and criteria" differs vastly from those of informal "guidance" and "policy." Guidance does not in and of itself have the force of law and is not enforceable. In contrast, "guidelines, rules, regulations and criteria" are enforceable if promulgated pursuant to the Administrative Procedure Act (which entails publication of the draft rule or regulation in the *Federal Register*, solicitation of public comment, consideration by the agency of the comments received, and publication of the final rule or regulation in the *Federal Register*).

In adopting the model Federal Facilities Agreement with EPA, DOD and the Military Departments agreed to conduct their CERCLA actions in accordance with "Superfund guidance and policy." Based on this language, EPA may take the position that DOD and the Air Force are contractually bound to go beyond their obligatory compliance with rules and regulations and to also comply with "policy and guidance" issued by the EPA. As discussed more fully in the legal Memorandum, the EPA position is not supportable and the DOD and Military Departments would not have considered agreeing to terms beyond those that are legally applicable and enforceable to them.

You have also asked about the authority of the Air Force with respect to the execution of CERCLA Records of Decision in the context of EPA's authority. As you know, the Secretary of Defense has delegated authority conferred by the President in Executive Order 12580 by which the Military Departments may act as lead agencies in CERCLA cleanups on lands under their


legal jurisdiction. Pursuant to this delegation, the Air Force may unilaterally issue Records of Decision under CERCLA on Air Force lands unless the site is on the National Priorities List. In such a case, the Air Force is required to adopt a physical remedy (those requirements specified in CERCLA and the National Contingency Plan for remedy selection and the Record of Decision) that has been concurred in by EPA. However, EPA's remedy-selection authority does not extend to prescribing whether implementation measures must be included in the Record of Decision.

In circumstances where EPA agrees with the physical remedy but declines to find that the remedy is complete (protective of human health and the environment) without additional implementation measures, and further declines to co-sign the Record of Decision, the Air Force is permitted to proceed independently to sign a Record of Decision that adopts only the physical remedy. EPA may assert that any such unilateral action is barred by terms of the model Federal Facilities Agreement, however, the Agreement only would preclude the Record of Decision from being deemed "final," but would not preclude the Air Force from continuing work on those components of the Record of Decision that are not in dispute. CERCLA requires that we execute and publish a Record of Decision before we commence remedial action.

You have also asked for my advice about inter-agency dispute mechanisms within the government. The applicable Executive Orders establish OMB as the forum for resolving disputes with respect to policy matters and DOJ's Office of Legal Counsel as the forum for resolving legal disputes. The dispute here presents issues of both law and fact, as well as the interpretation of several Executive Orders (which are the responsibility of OMB). As such, I recommend the Air Force refer the issues at least initially to OMB for resolution.

From a policy perspective, if these ongoing disputes with EPA are left unresolved, they will have a negative impact on future Air Force cleanup programs. The Air Force takes its responsibility as environmental steward seriously and needs to move forward with its CERCLA program. The Air Force has always acknowledged EPA's post-Record of Decision consultation and oversight functions with regard to remedy implementation. However, EPA is attempting to impose implementation requirements for post-Record of Decision documents and reports that add nothing to the speed, cost-effectiveness or soundness of the remedy, and may properly be resisted by the Air Force.

As I stated previously, the issues discussed herein are a summary of the more detailed legal Memorandum addressed to you and contain some recommendations not contained therein. I recommend you review the Memorandum for a complete discussion and analysis of these issues.


MARY L. WALKER
General Counsel